

HUMAN RIGHTS AND MIGRATION LAW CLINIC

THE CIRCUMVENTION OF THE DUBLIN III REGULATION THROUGH THE USE OF BILATERAL AGREEMENTS TO RETURN ASYLUM SEEKERS TO OTHER MEMBER STATES

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Executive summary

In recent years, the conclusion of bilateral agreements between EU Member States in areas of non-exclusive competences of the EU and Member States has generated a debate about the shortcomings of such 'extra EU' cooperation and the limitations imposed by EU law. This paper examines the limitations imposed by EU law to Member States' powers to act through the use of bilateral agreements in areas where the EU has already acted. The analysis focuses on the case of the 'Administrative Arrangement' concluded between Germany and Greece in August 2018 which risks precluding a number of provisions of the Dublin III Regulation – a key part of the existing legislative framework under the Common European Asylum System. By applying the pre-emption doctrine, a potential violation of EU law has been identified with respect to: i) The right to access the procedure for examining an application for international protection and the hierarchy of criteria for determining the Member State responsible; ii) the principle of *non-refoulement*; iii) procedural rules laid down by the Dublin III Regulation; and iv) legal safeguards. Furthermore, the paper analyses to which extent Member States have a mandate to act within the applicable legislative framework, the Dublin III Regulation. According to Article 36 Dublin III, Member States may act on a bilateral basis by adopting administrative arrangements as far as they concern practical details of the implementation of Dublin III and if the procedure laid down in Article 36(3)-(5) has been followed. The scope left for Member States in regard to Article 36 is to conclude implementing acts based on Article 291 TFEU. However, the 'Administrative Arrangement' between Germany and Greece cannot be regarded as an administrative arrangement under Article 36 Dublin III, nor as an implementing act under Article 291 TFEU since it goes beyond the scope of both articles. Finally, the paper examines the responsibility/liability of Member States for not applying EU law in areas of shared competences in which the EU has acted. In this regard, Member States are obliged to comply with EU law and thus responsible for the implementation of the Dublin III Regulation. In case a Member State fails to apply EU law in a domain which is regulated, individuals can hold a Member State accountable for breaching EU law and seek redress before the national courts. National judges have the discretion to render the 'Administrative Agreement' inapplicable or they can refer the matter to the CJEU through the preliminary ruling procedure, as described in Article 267 TFEU.

Table of Contents

| | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| Introduction..... | 5 |
| 1. Legislative framework applicable to the bilateral agreements | 6 |
| A. An introduction of relevant EU legal concepts | 6 |
| B. ‘Administrative Arrangement’: a type of international (bilateral) agreements | 7 |
| C. Dublin III Regulation | 8 |
| 2. Liability/ responsibility of Member States for not applying EU law in an area which is regulated by the EU | 8 |
| A. “To the extent that the Union has not exercised its competence” | 9 |
| B. Article 36 Dublin III Regulation: providing Member States a mandate to act? | 16 |
| C. ‘Administrative Arrangement’ as implementing act under Article 291 TFEU? | 19 |
| D. Conclusion on Dublin III: Limitations to Member States’ powers to act bilaterally in areas where the EU has acted ²⁰ | |
| 3. How can individuals hold a Member State accountable for not applying Dublin III but a bilateral agreement instead? | 20 |
| A. Possible procedural avenues ‘against’ a bilateral agreement | 20 |
| B. Individuals’ right to reparation under EU law (the Francovich doctrine)..... | 22 |
| C. Conclusion: Possible consequences for Germany and Greece due to the implementation of the ‘Administrative Arrangement’ instead of Dublin III | 24 |
| 4. General conclusion | 24 |
| 5. Annex I: Summary of the conflicting provisions between EU law and the ‘Administrative Arrangement’ | 26 |
| 6. Annex II: document received by the Commission under Regulation 1049/2001 | 27 |

Introduction

Since 2015, migration has emerged as one of the controversial topics dominating European and national political debates. The talks on the reform of the Common European Asylum System (hereinafter: CEAS), including the Dublin Regulation¹, have stalled and EU Member States (hereinafter: Member States) have searched for solutions outside the asylum package's negotiation. For instance, certain Member States have concluded administrative arrangements on the implementation of the Dublin III Regulation (hereinafter: Dublin III). The question arises whether such bilateral agreements circumvent the criteria and safeguards set forth in Dublin III. Therefore, this paper analyses the legal consequences of these bilateral agreements from an EU law perspective.²

First, EU legal concepts relevant for the case are introduced. Second, the paper examines liability and responsibility of Member States for not applying EU law in a domain which is regulated by the EU. In the first subsection, the key question as "to which extent the Union has exercised its competence" with Dublin III, so that the provisions of these bilateral agreements become incompatible with EU law, will be examined by applying the pre-emption doctrine. The 'Administrative Arrangement'³ concluded between Germany and Greece will be analysed with a view to identifying potential conflicting rules with Dublin III and the EU Charter of Fundamental Rights (hereinafter: the Charter)⁴. The second subsection will examine how far Member States may act on their own by adopting administrative arrangements provided for in Article 36 Dublin III. In the third subsection, the scope of 'implementing acts' such as described in Article 291 TFEU will be elaborated, to conclude whether or not the bilateral agreement can be considered a necessity to implement legally binding Union acts. The next and final section explains the consequences if Member States fail to comply with the provisions of Dublin III. Particularly, the section reflects upon the infringement proceeding which can be introduced against Germany and Greece as well as individuals' rights to reparation when they have sustained damage due to the implementation of the 'Administrative Arrangement'.

¹ Regulation (EU) 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L 180/31 (Dublin III)

² As a limitation, only the 'Administrative Arrangement' concluded between Germany and Greece is publicly available; 'Administrative Arrangement (Germany-Greece)' (adopted and entered into force 18 August 2018) <<http://rsaegean.org/the-administrative-arrangement-between-greece-and-germany/>> accessed 21 November 2018

³ 'Administrative Arrangement' (n 2)

⁴ Charter of Fundamental Rights of the European Union [2000] OJ C 326/391 (EU Charter)

1. Legislative framework applicable to the bilateral agreements

A. An introduction of relevant EU legal concepts

- Union competences: exclusive and shared competences

The principle of conferral is the fundamental constitutional principle regulating the powers of the EU. Pursuant to Article 5(2) TEU, the Union shall act only within the scope of competences conferred upon it by the Member States in the Treaties. Competences not conferred upon the Union in the Treaties remain with the Member States.

Exclusive competences. Article 2 TFEU recognises exclusive and shared competence categories in which the competences are conferred either on the Union and/or the Member States.⁵

Shared competences. The EU and the Member States may adopt legally binding acts in areas of shared competences conferred upon by the Treaties pursuant to Article 2(2) TFEU. To this regard, “the Member States shall exercise their competence to the extent that the Union has not exercised its competence”.⁶

- Direct effect of EU law

Pursuant to the principle of direct effect, EU law poses obligations on Member States and may confer rights on individuals, which the national courts are obliged to recognise and enforce. Individuals can invoke specific provisions if they meet the conditions⁷ for direct effect before national courts.⁸ Direct effect is not explicitly derived from the Treaties, but these conditions were laid down in the case law of the Court of Justice of the European Union (hereinafter: CJEU).⁹ Direct effect applies in principle to all binding EU law, including the Treaties, the Charter and secondary legislation, including regulations, directives and decisions.¹⁰

- Legal supremacy of EU law

The principle of supremacy of EU law implies that EU law takes precedence over domestic law. The rules shall be enforced in national courts, even where this involves ignoring or setting aside conflicting domestic

⁵ The EU may also exercise coordinating or complementary competences in the areas belonging primarily to Member States' competences pursuant to Article 2(3-5) TFEU. Pursuant to Article 2(1) TFEU, in areas of exclusive competences, only the EU is entitled to adopt legally binding acts; Following Articles 3(2) and 216(1), the exclusive competences include the EU's external competences to conclude international agreements.

⁶ Article 2 TFEU; The principle areas of shared competences are listed in Article 4 TFEU.

⁷ Treaty provision shall be clear, unconditional and prohibition would need to be autonomous. Robert Schütze, *An introduction to European law* (Cambridge University Press 2012) 114-116

⁸ Schütze (n 7) 117; Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (6th edn, Oxford University Press, 2015) 184

⁹ Case 26-62 *Van Gend & Loos v Netherlands Inland Revenue Administration* EU:C:1963:1

¹⁰ Craig and de Búrca (n 8) 184

provisions, which could impede the application of EU law.¹¹ In situations where EU law has direct effect and comes into conflict with national law, the EU legal order has developed a set of rules determining when and how the existence and the exercise of different types of Union powers pose constraints on Member States' powers to act.¹² The CJEU has confirmed the principle of supremacy of EU law in its various fundamental rulings implying that EU law prevails over the national provisions in case of conflicting provisions.¹³ In such situations, EU law would make the national provision inapplicable,¹⁴ providing a remedy which individuals may bring before a national court.¹⁵

B. 'Administrative Arrangement': a type of international (bilateral) agreements

Bilateral or multilateral agreements ('treaties') concluded between sovereign states in written form are legally binding under international law if the states so intend, irrespective of what they are called.¹⁶ EU Member States may bilaterally or multilaterally resort to concluding international agreements in areas where existing EU law does not prevail national norms.¹⁷ These type of bilateral agreements should be differentiated from the agreements concluded between one or more Member States and third countries.¹⁸ This paper views the 'Administrative Arrangement', concluded between Germany and Greece in the framework of asylum seekers' return when apprehended at the Germany-Austrian borders in August 2018¹⁹, as a bilateral agreement concluded between the two Member States under international law.²⁰ In this context, it is also

¹¹ Ibid 266

¹² Angelos Dimopoulos, 'Taming the Conclusion of Inter Se Agreements between EU Member States: The Role of the Duty of Loyalty' (2015) 34 YEL 286

¹³ Case 6/64 *Flaminio Costa v. E.N.E.L.* EU:C:1964:66 (hereinafter *Costa v. E.N.E.L.*); Case 11/70 *International Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* EU:C:1970:114; Case 106/77 *Amministrazione delle finanze dello Stato v. Simmenthal SpA* EU:C:1978:49 hereinafter: *Simmenthal*)

¹⁴ *Simmenthal* (n 13) 1

¹⁵ Schütze (n 7) 142-143

¹⁶ Article 2(1) (a) of the Vienna Convention on the Law of Treaties of 1969 defines that a 'treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'. Furthermore, the ICJ has held in *Qatar v. Bahrain, 1 July 1994* that the legal value of a particular document does not depend on what it is called, but rather on the actual terms of the agreement, the intention of the parties and the signatories' position.

¹⁷ Dimopoulos (n 12) 287

¹⁸ Following the ERTA case (Case 22/70 *Commission v Council* EU:C:1971:32 1971), areas where the EU has acted internally may become implied exclusive external competence, for example for the conclusion of international agreements, if this is necessary for the exercise of the internal competence, or if it can affect EU measures taken as regulated in Article 3(2) TFEU.

¹⁹ 'Administrative Arrangement' (n 2)

²⁰ An in-depth analysis of the qualification of the 'Administrative Arrangement' as an international agreement extends the scope of this research. To this regard, see also Part 2 B of this paper where it is concluded that the 'Administrative Arrangement' cannot be solely qualified as an administrative arrangement pursuant to Article 36 Dublin III. For further references that qualify the 'Administrative Arrangement' as an international agreement, see for instance 'The Case of the Administrative Arrangement between Greece and Germany: A tale of "paraDublin activity"?' (EDAL, 5 November 2018) <<http://www.asylumlawdatabase.eu/en/journal/case-administrative-arrangement-between-greece-and-germany-tale-paraDublin-activity>> accessed 20 November 2018; 'Serious violations regarding the return of an asylum seeker as part of the implementation of the so-called "Greek-German Administrative Arrangement"' (Greek Council for Refugees, 25 October 2018)

crucial to note that the question of whether a Member State acts individually or bilaterally has no impact on determining whether there is a violation of EU law or not.²¹

In the past years, Member States have resorted to the use of bilateral agreements instead of EU law in the areas of economic policy coordination and intellectual property protection.²² The CJEU has in a selected amount of cases examined the constraints posed by EU law on the conclusion of such bilateral agreements between Member States.²³ The CJEU has established that bilateral agreements under international law remain a tool for Member States in areas of non-exclusive competences²⁴ as long as they respect the powers of the EU institutions and the role of the CJEU overseeing the EU jurisdiction, and they do not introduce provisions that directly conflict with EU rules.²⁵ Consequently, Member States may act both individually and bilaterally in the areas where the EU has not yet acted, following the principles of international law.²⁶

C. Dublin III Regulation

Article 78 TFEU provides for the legal basis for the EU's common asylum policy whilst Article 4 TFEU confirms that the area of freedom, security and justice is a shared competence between the EU and the Member States²⁷. In view of this, the EU asylum policy constitutes a shared competence. Dublin III is a regulation, so its provisions will typically have direct effect if they are sufficiently precise and unconditional (cf. conditions for direct effect). National courts are thus obliged to apply the Dublin III provisions over national law in conflicting cases.

2. Liability/ responsibility of Member States for not applying EU law in an area which is regulated by the EU

Member States are responsible for any measure, insofar as it emanates from the state or from an entity controlled by the state, that formally conflicts with EU law. Responsibility can be triggered by administrative

<https://www.gcr.gr/en/news/press-releases-announcements/item/995-serious-violations-regarding-the-return-of-an-asylum-seeker-as-part-of-the-implementation-of-the-so-called-greek-german-administrative-arrangement> accessed 24 October 2018.

²¹ The Commission may open an infringement procedure even if one Member State is considered to breach EU law. See for more details in the Chapter 3, Part B vii of this paper.

²² Dimopoulos (n 12) 287; Academic scholars may use the term 'inter se agreements' in reference to bilateral agreements. For the sake of consistency, this paper uses the term 'bilateral agreements'. See for instance Dimopoulos (n 12) and Bruno de Witte, 'Using International Law in the Euro Crisis - Causes and Consequences' [2013] (Arena Working Paper no. 4, June 2013, Centre for European Studies, University of Oslo) <<https://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2013/wp4-13.pdf>> accessed 29 November 2018

²³ For instance Case C-370/12 *Thomas Pringle v Government of Ireland and Others* EU:C:2012:756 (hereinafter: *Pringle*)

²⁴ Non-exclusive competences refer to shared competences recognised in Article 4 TFEU as well as EU competences in areas of coordinative powers covered in Article 5 TEU.

²⁵ Dimopoulos (n 12) 301

²⁶ Article 2 TFEU

²⁷ Article 4(2) j TFEU

practices which conflict with EU law, as well as omissions and failures to act.²⁸ In our case, a bilateral agreement, known as the 'Administrative Arrangement', was concluded between the Ministry of Migration Policy of the Hellenic Republic for the Greek part and the Federal Ministry of Interior, Building and Community of the Republic of Germany for the part of Germany.²⁹ This section analyses whether Germany and Greece, with the conclusion of this 'Administrative Arrangement', can be held responsible for not applying EU law. As mentioned above, the principle of primacy of EU law can be used as a principal rule to resolve conflicts between EU and non-EU norms. As a principle, when a competence is shared between the EU and Member States, EU law overrules national provisions as set out in Article 2(2) TFEU. Hence, EU law would allow the conclusion of bilateral agreements to the extent that the EU has not exercised its competence.³⁰

A. "To the extent that the Union has not exercised its competence"

The pre-emption doctrine can be applied to determine whether a conflict exists between two legal norms. This however requires a prior clarification of what is qualified as a superior norm in order to determine which norm pre-empts the other. The CJEU has used this doctrine to establish whether compliance with both norms is possible, and if not, which legal norm should have precedence over the conflicting norm. In the case of bilateral agreements outside the EU's exclusive competences, the pre-emption exists when the provisions of a bilateral agreement concluded between Member States literally conflict with specific primary or secondary EU law provisions.³¹ In such cases, compliance with both sets of provisions is impossible.³² This was confirmed in *Pringle*, where the CJEU examined the compatibility of a bilateral agreement in the area of non-exclusive competences with EU law by applying the rule pre-emption doctrine. The CJEU confirmed that incompatibility only exists when bilateral agreements directly preclude the adoption of specific provisions

²⁸ Lucy Hatton, 'Democracy in the EU' (CIVITAS, July 2011) <<https://www.civitas.org.uk/content/files/CIT5.-Dem.pdf>> accessed 23 November 2018

²⁹ 'Administrative Arrangement' (n 2); It could be however questioned as to whether Germany complies with its domestic procedures for concluding international agreements. Pursuant to Article 59 (1) of the Basic Law, the Federal President shall conclude treaties on behalf of Germany. The approval of the German Parliament is required if (i) a treaty regulates the political relations of Germany; or (ii) relates to subjects of federal legislation. The approval is not required for administrative agreements that facilitate implementation, pursuant to Article 59 (2) of the Basic Law. A further analysis is required to establish whether the 'Administrative Arrangement' shall require the approval of the German Parliament. This extends the scope of this paper, as the paper focuses on EU law instead.

³⁰ Dimopoulos (n 12) 296

³¹ The rule pre-emption doctrine is applied in the federal legal orders. Deriving for instance from the U.S. Constitution (Article VI (2)), the conflicts between federal and state legislation are typically resolved in favour of the former. Robert Schütze, 'Supremacy without pre-emption? The very slowly emergent doctrine of community pre-emption' (2006) CMLR 1023-1024. The term rule-pre-emption is mainly used by scholars, elaborated on by Schütze in particular but also Dimopoulos (n 12), whereas case law often depicts the conflict between the primacy of EU law vis-à-vis national law in areas of non-exclusive EU competences as more recently in *Pringle* (n 23) and originally in *Costa v. E.N.E.L* (n 13) and *Simmenthal* (n 13).

³² Dimopoulos (n 12) 296, see also Schütze (n 31) 1042

envisaged in the Treaties.³³ This being the case, primary and secondary EU law both have precedence over bilateral agreements concluded between Member States.³⁴

Dublin III establishes the criteria and mechanisms for determining which Member State is responsible for the examination of an application for international protection. Bilateral agreements concluded between Member States, such as the 'Administrative Arrangement', risk setting forth alternative rules whose scope would move beyond the obligations and / or potentially limit safeguards established in Dublin III.³⁵ An analysis of the 'Administrative Arrangement' indicates a number of potential conflicts with the following provisions of Dublin III and the EU Charter of Fundamental Rights – regardless of whether pre-emption is considered strictly (a rule directly affected by the 'Administrative Arrangement') or more broadly (see a summary of the conflicting provisions in Annex I).

- The right to access the procedure for examining an application for international protection and the hierarchy of criteria for determining the Member State responsible

The 'Administrative Arrangement' sets out in No 1 the conditions for the refusal of entry decisions at the German-Austrian border: i) identification of the person followed by a refusal of entry; ii) the person is not an unaccompanied minor; iii) the person seeks international protection; iv) the person has already requested protection in Greece based on the Eurodac system.³⁶ Article 3 Dublin III lays down the obligation of Member States to examine any application for international protection by a third country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. It further provides that the Member State responsible for examining the application shall be determined on the basis of the criteria in accordance with Article 7 Dublin III. In case law, the CJEU reaffirms the Member States' obligation to respect the correct application of the rules of procedure enshrined in Dublin III, *inter alia*, the criteria of hierarchy for determining the Member State responsible for examining the application for international protection.³⁷ An asylum seeker is entitled to invoke an incorrect application of a criterion listed in Article 7 Dublin III before the CJEU.³⁸ Non-compliance with the Dublin III rules of procedure, hence the examination of any application for international protection and orderly application of the hierarchy of criteria enshrined in Dublin III, results in a potential violation of Articles 3 and 7 Dublin III as the refusal of

³³ *Pringle* (n 23), paras 108-114

³⁴ See for example *De Witte* (n 22) 21; *Dimopoulos* (n 12) 296 and *Schütze* (n 31) 1042

³⁵ See 'The Case of the Administrative Arrangement between Greece and Germany: A tale of "paraDublin activity"?' (n 20)

³⁶ 'Administrative Arrangement' (n 2) No 1.

³⁷ Case C-63/15 *Mehrdad Ghezelbash v Staatssecretaris van Veiligheid en Justitie* EU:C:2016:409 (hereinafter: *Ghezelbash*); See also: Case C-647/16 *Hassan v Préfet du Pas-de-Calais* EU:C:2018:368 (hereinafter: *Hassan*); Case C-670/16 *Tsegezab Mengesteab v Bundesrepublik Deutschland* EU:C:2017:587; Case C-155/15, *George Karim v Migrationsverket* EU:C:2016:410 (hereinafter: *Karim*).

³⁸ *Ghezelbash* (n 37)

entry decision on the basis of the 'Administrative Arrangement' only complies with the first Dublin III criteria (status of a minor) in accordance with Article 8 Dublin III. Subsequently, the refusal of entry decision under the 'Administrative Arrangement' would be based on Eurodac hits (first entry/stay) whilst disregarding the potential criteria for family reunification³⁹ and/or the possession of valid residence documents or visas.⁴⁰ Hence, the conditions set out in the 'Administrative Arrangement' risk creating an automatic readmission to Greece, which would bypass the correct application of Article 7 Dublin III.⁴¹ Furthermore, and against the principles of Article 18 of the Charter (right to asylum), the 'Administrative Arrangement' results in asylum seekers unlawfully refused entry at the German borders without being channelled into a fully-fledged Dublin III procedure where the rules of procedure for the examination of the application are met.⁴²

- The principle of *non-refoulement*

The 'Administrative Arrangement' does not contain any safeguard nor indication of a merit-based examination as to whether there are substantial grounds to believe that apprehended persons at the border would face a real risk of being subject to ill-treatment in Greece.⁴³ It also provides no indication of Germany's obligation to request and receive individual guarantees from the Greek authorities that they will adhere to the reception conditions and procedural standards in each individual case.⁴⁴ Instead, it sets up an automatic response system where the German authority provides the Greek side with an automatic email or fax notification of refusal of entry. The notification shall be sent as soon as the conditions set out in No 1 of the 'Administrative Arrangement' have been determined at the border.⁴⁵ The transfer will take place within 48 hours of the refusal of entry decision.⁴⁶ In case law, the principle of *non-refoulement* and merit-based examination of individual situations vis-à-vis the reception conditions and systematic deficiencies in the asylum procedure have been reaffirmed by the CJEU.⁴⁷ Domestic case law from Belgium, the Netherlands and Germany has suspended returns to Greece in 2018 referring to the existence of systematic deficiencies in the Greek asylum system related, *inter alia*, to the lack of basic services (housing, health care and

³⁹ Dublin Regulation III, arts 9-11.

⁴⁰ *ibid*, art 12; 'Administrative Arrangement' (n 2) No 1.

⁴¹ See 'Gewolltes Recht' (Verfassungsblog, 2 November 2018) <<https://verfassungsblog.de/gewolltes-recht/>> accessed 24 November 2018

⁴² *Ibid*

⁴³ See *Hirsi Jamaa and Others v. Italy*, App No. 27765/09 (ECtHR, 23 February 2012). It is established in the case law of the ECtHR that "expulsion, extradition or any other measure to remove an alien may give rise to an issue under Article 3 of the Convention, and hence engage the responsibility of the expelling State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country"

⁴⁴ See for instance *Tarakhel v. Switzerland*, App no. 29217/12 (ECtHR, 4 November 2014)

⁴⁵ 'Administrative Arrangement' (n 2) No 2.

⁴⁶ *Ibid*, No 3.

⁴⁷ Case C-411-10 and C-493-10 Joined cases of *N.S. v United Kingdom and M.E. v Ireland* EU:C:2011:865

education, social security) and overcrowded asylum centres.⁴⁸ The first return of an asylum seeker since the implementation of the 'Administrative Arrangement' took reportedly place in September 2018 following a procedure in which the asylum seeker was refused entry at the German border and deported on the same day.⁴⁹ In Greece, according to the Greek Refugee Council, he was kept in conditions that constitute inhuman and degrading treatment while a readmission was pending to Turkey.⁵⁰ In view of this, the 'Administrative Arrangement' risks undermining the principle of *non-refoulement* enshrined in Article 4 of the Charter and Article 3(2) Dublin III. The 'Administrative Arrangement' thus conflicts with the Member States' obligations provided for in Article 3(2) Dublin III requiring the examination of the reception conditions and the deficiencies in the asylum system of the receiving Member State prior the transfer.⁵¹ Such examination and reception of individual guarantees can be reasonably considered impossible within an automatic notification and transfer system.

- Dublin-specific procedural guarantees

The 'Administrative Arrangement' does not imply any obligation for 'take back' or 'take charge' requests lodged by the German authorities towards the Greek authorities when persons have been apprehended at the German border. Nor any implicit or explicit acceptance is received from the Greek authorities prior the transfer has been carried out from Germany to Greece.⁵² Consequently, the readmission procedure entirely circumvents the explicit procedural elements enshrined in Dublin III that sets out clear procedural rules and order for completing the 'take charge' and 'take back' requests.⁵³ Furthermore, it lacks any indication of the asylum seekers' right to information and personal interview guaranteed by Articles 4 and 5 Dublin III in view of informing about the applicant's rights and verifying the applicant's status and the responsible Member State. The CJEU has been unequivocal on the procedural order of Dublin III provisions in respect of lodging a request within the specific time limits, acceptance or expiration of those time limits by the requested Member State, applicant's notification of the decision and the right to appeal.⁵⁴ According to the CJEU, non-

⁴⁸ Case No 210384 (CALL, 1 October 2018) < http://www.rvv-cce.be/sites/default/files/arr/a210384.an_.pdf > accessed 30 November 2018; Case No 5 V 837/18 - *asyl.net: M26388* (VG Bremen, 12 July 2018) < <https://www.asyl.net/rsdb/m26388/> > accessed 30 November 2018; Cases NL18.5739 and NL18.5742 (Court of The Hague, 3 May 2018) ECLI: NL: RBDHA: 2018: 5286 < <https://www.navigator.nl/document/id1a9e53823929407da43db80afaeb2464?anchor=id-6524a4a1-a2c7-4abb-a74a-c77ccf21e904> > accessed 30 November 2018; Case *Germany – VG Magdeburg* 9A 198/18 MD

⁴⁹ 'Serious violations regarding the return of an asylum seeker as part of the implementation of the so-called "Greek-German Administrative Arrangement"' (n 20)

⁵⁰ *ibid* (n 20)

⁵¹ See also *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR 21 January 2011): where after establishing the deficiencies in the asylum procedures in Greece, the Court also found violation of Article 3 ECHR by Belgium (the sending Member State) for exposing the applicant to the risks arising from the deficiencies in the asylum procedure in Greece.

⁵² 'Administrative Arrangement' (n 2) Nos. 1-4.

⁵³ Dublin III (n 1) Section II and III.

⁵⁴ *Hassan* (n 37); *Ghezelbash* (n 37)

adherence to the procedural rules of Dublin III is not only a procedural matter but provides the applicant with a safeguard against leaving the asylum seekers 'in orbit'.⁵⁵ To this respect, considering that Germany assumes the procedural order laid down in Nos. 1–4 of the 'Administrative Arrangement', it fails to comply with the explicit procedural rule of Dublin III as to the 'take charge' and 'take back' requests, including the fact that there is no implicit or explicit acceptance received from the Greek authorities. This ultimately risks undermining the rights of the asylum seekers enshrined in Dublin III.⁵⁶ In consequence, the asylum seekers could challenge a procedural breach of Dublin III before a national court by invoking non-compliance with the explicit procedural rules of Dublin III as to the 'take charge' and 'take back' requests under Section II and II of Dublin III.⁵⁷

- The legal safeguards

Finally, the 'Administrative Arrangement' does not provide for any indication of the right to appeal against the refusal of entry decision. Instead, the transfer shall be initiated as soon as the conditions laid down in No 1 of the 'Administrative Arrangement' have been determined and the Greek authorities have been notified with an automatic message.⁵⁸ The CJEU places a significant emphasis on compliance with the specific procedural rules established by Dublin III, including the right to an effective and rapid remedy provided for the asylum seekers.⁵⁹ The CJEU thereby reaffirms that the objective of the legal safeguards is not only to regulate the relations between Member States but to guarantee the involvement of the asylum seeker in the process of determining the responsible Member State and examination of the application, to ensure an effective remedy and a fair trial, and the possibility to challenge a transfer decision.⁶⁰ As a consequence, the asylum seekers may contest a transfer decision and invoke an infringement of the incorrect application of the legal safeguards laid down in Dublin III.⁶¹ The CJEU also presupposes that the person concerned must have access to a remedy with automatic suspensive effect until the legal validity of the decision has been examined against a potential removal to a country where there is real reason to believe the persons would face the risk of being subjected to ill-treatment.⁶² In contrast, the 'Administrative Arrangement' does not allow the asylum seekers to enjoy the full set of legal safeguards guaranteed by Dublin III. This non-

⁵⁵ Case C-201/16 *Majid auch Madzhdi Shiri v Bundesamt für Fremdenwesen und Asyl* [2017] ECLI:EU:C:2017:805 (hereinafter: *Shiri*), Opinion of AG Sharpston (hereinafter: *AG Opinion Shiri*)

⁵⁶ Dublin III (n 1) Section II and III.

⁵⁷ *Shiri* (n 55)

⁵⁸ 'Administrative Arrangement' (n 2) No 1 and No 2.

⁵⁹ See for instance *Shiri* (n 55); *Ghezelbash* (n 37); *Hassan* (n 37)

⁶⁰ *Ghezelbash* (n 37)

⁶¹ *Karim* (n 37); *Ghezelbash* (n 37)

⁶² Case C-181/16 *Sadikou Gnandi v État belge* EU:C:2018:465. See also *A.M. v. the Netherlands*, App no. 29094/09 (ECtHR, 5 July 2016) and *Gebremedhin (Gaberamadhien) v France*, App no. 25389/0 (ECtHR, 26 April 2007)

compliance with the legal safeguards conflicts with the obligations enshrined in Article 27 Dublin III as well as in Article 47 of the Charter guaranteeing the right to effective remedy against a transfer decision before a court. By initiating the transfer with an automatic notification and within 48 hours from the refusal of entry decision⁶³, the ‘Administrative Arrangement’ circumvents the asylum seekers’ right to contest the transfer decision and/or invoke an infringement of rules in the domestic proceedings within a reasonable time. A lawful transfer should only be made after the expiry of a reasonable time that guarantees the asylum seekers’ access to these legal safeguards.⁶⁴ Arguably, an automatic notification system does not meet the requirement of a “reasonable time”.

- [Pre-emption of the application of the Dublin III Regulation and the EU Charter of Fundamental Rights in the broad sense](#)

The pre-emption doctrine based on explicitly conflicting rules, as presented above, is likely to generate the strongest normative arguments before the CJEU.⁶⁵ Nevertheless, conflicts may also arise when bilateral agreements generally frustrate the application of EU law.⁶⁶ This implies that a lower-level domestic provision shall not interfere with, thus “frustrate”, the execution of the full purpose and objectives of EU law.⁶⁷ In light of this argument, which applies the pre-emption in the broad sense, the ‘Administrative Arrangement’ risks frustrating the application of those Dublin III provisions that have direct effect,⁶⁸ as well as the application of the fundamental rights and principles enshrined in the Charter.⁶⁹ By applying contradicting criteria upon the refusal of entry at the border, that triggers an automatic transfer decision within 48 hours⁷⁰, the ‘Administrative Arrangement’ firstly interferes with the underlying objectives of Dublin III, that places a significant emphasis on the correct application of the criteria for determining the responsible Member State⁷¹. Secondly, the ‘Administrative Arrangement’ frustrates the legal safeguards and procedural rules guaranteed by Dublin III, assuring a degree of certainty for the applicants and the possibility to challenge the decision⁷². These key objectives of Dublin III have been reaffirmed by the CJEU by emphasising the central role of the legal safeguards and procedural rules in the Dublin III procedure which shall guarantee the rights

⁶³ ‘Administrative Arrangement’ (n 2), No 2 and No 3.

⁶⁴ See ‘Gewolltes Recht’ (n 41)

⁶⁵ Schütze (n 31) CMRL 1041

⁶⁶ Dimopoulos (n 12) 299

⁶⁷ Schütze (n 31) CMRL 1038

⁶⁸ If the conditions are met (cf. direct effect)

⁶⁹ Article 51 EU Charter

⁷⁰ ‘Administrative Arrangement’ (n 2), No 2 and No 3.

⁷¹ Dublin III, art 7.

⁷² *AG Opinion Shiri* (n 55), para 41

and a sufficient degree of certainty for the asylum seekers throughout the process.⁷³ In addition, the 'Administrative Arrangement' frustrates the fundamental rights and principles that guarantee the right to asylum⁷⁴ and the right to an effective remedy enshrined in the Charter⁷⁵. Finally, non-compliance of the 'Administrative Arrangement' with the right to asylum provided for by Article 18 of the Charter together with the right to access the asylum procedure in Article 3 Dublin III not only frustrates these rights, which shall be applied in accordance with EU law, but risks violating the Union's international obligations guaranteed by the Charter when EU law is applied.⁷⁶

- Conclusion: Preclusion of the Dublin III provisions and relevant articles of the EU Charter of Fundamental Rights?

In this first part, the pre-emption doctrine has been applied in analysing the potential conflicts between the provisions of Dublin III and the Charter, on the one hand, and the 'Administrative Arrangement' constituting a bilateral agreement between two Member States, on the other. A number of potential violations of the specific provisions of Dublin III and fundamental rights enshrined in the Charter have been identified. In conclusion, compliance with the 'Administrative Agreement' risks precluding certain Dublin III and Charter provisions. First, the Dublin III provisions at risk are the provisions obliging Member States to process any application for international protection and to apply orderly the criteria determining the responsible Member State. This principle is further emphasised by the Charter. Second, Member States are obliged to respect the principle of *non-refoulement*, which limits the possibility to transfer asylum seekers between Member States in cases where the reception conditions and proper functioning of the asylum procedure of the receiving Member States are not met or are at risk. Third, the conditions and procedural rules set out in the 'Administrative Arrangement' risk violating the legal and procedural safeguards specified by Dublin III and enshrined in the Charter. Finally, the 'Administrative Arrangement' not only fails to comply with certain explicit provisions of Dublin III, it also frustrates the application of the fundamental rights of the Charter, whose provisions shall be applied in line with international law and international agreements to which the EU and Member States are party.⁷⁷

⁷³ *Ghezelbash* (n 37); *Hassan* (n 37); *AG Opinion Shiri* (n 55)

⁷⁴ Article 18 EU Charter

⁷⁵ *Ibid*, Article 47

⁷⁶ The Convention Relating to the Status of Refugees [1951] United Nations, Treaty Series, vol. 189; Protocol Relating to the Status of Refugees [1967] United Nations, Treaty Series, vol. 606; Articles 51 and 53 EU Charter.

⁷⁷ Article 53 EU Charter

B. Article 36 Dublin III Regulation: providing Member States a mandate to act?

Although Member States may not act beyond the extent that the Union has exercised its competence, Article 36(1) Dublin III provides for the opportunity to establish administrative arrangements, on a bilateral basis, concerning the practical details of the implementation of Dublin III, in view of facilitating the application and increasing effectiveness of the regulation. Such arrangements may relate to exchanges of liaison officers, or the amplification of the procedures and shortening of the time limits relating to transmission and the examination of requests to take charge of or take back applicants.⁷⁸

- Substantive assessment

The 'Administrative Arrangement' does not fulfil the requirements of an administrative arrangement under Article 36(1) Dublin III since it does not "simplify procedures", but fundamentally alters them by making it impossible to respect the legal safeguards of Dublin III, and by providing for an automatic take-over without any form of procedure which complies with the logic of requesting a MS to take responsibility of a claim and an applicant's right to contest such a determination. In addition, an automated acknowledgement of receipt activates a transfer of responsibility within six hours in the event of non-opposition. This is not a "shortening of time limits", but an approach that deviates from Dublin III, which is not in line with the scope of Article 36(1).

- Procedural requirements

Even if it could be argued that the 'Administrative Arrangement' to return asylum seekers to other Member States is an administrative arrangement in conformity with Article 36(1) Dublin III, Member States shall follow the procedure stipulated in Article 36(3)-(5) Dublin III in order to ensure such compatibility. Consequently, Member States are obliged to consult the European Commission (hereinafter: the Commission) on draft arrangements before concluding or amending any arrangement referred to in Article 36(1) paragraph (b) Dublin III⁷⁹ on a bilateral basis.⁸⁰ If the Commission considers the arrangements incompatible with Dublin III, it shall, within a reasonable period, notify the Member States concerned.⁸¹ Member States shall take all

⁷⁸ Dublin III Regulation, art 36(1); Steven Peers, Violeta Moreno-Lax, Madeline Garlick and Elspeth Guild, *EU Immigration and Asylum Law (Text and Commentary)* (2nd edn, Hotei Publishing 2015) 377; It is not clear whether this list is exhaustive or not. Arguably it is not possible for Member States to agree on different rules concerning responsibility for applications, but in any event the sovereignty and humanitarian clauses in the Regulation give them much flexibility as regards these issues. However, Member States surely cannot agree to override the responsibility rules regarding children and family reunion, since they give effect to Charter rights.

⁷⁹ Simplification of the procedures and shortening of the time limits relating to transmission and the examination of requests to take charge of or take back applicants.

⁸⁰ Dublin III, art 36(3).

⁸¹ Ibid, art 36(4).

appropriate steps to amend the arrangement concerned within a reasonable time in such a way as to eliminate any incompatibilities observed.⁸²

In the field of internal market law, Member States must notify any draft technical regulation to the Commission which analyses these in the light of EU legislation.⁸³ Per analogy, the consequences of non-compliance with procedural requirements, as laid down in EU legislation, will be discussed in the light of the cases of *CIA security* (C-194/94) and *Unilever* (C-443/98). In *CIA Security International SA v Signalson SA and Securitel SPRL*⁸⁴, Belgium had failed to consult the Commission as required by Directive 83/189/EC. The national law was thus in breach with EU law, namely Articles 8 and 9 of the Directive, which require the Member States to notify the Commission of all draft technical regulations covered by the Directive. In *Unilever Italia SpA v Central Food SpA*⁸⁵, technical rules were adopted by Italy and although approval had been sought from the Commission, this was in breach of a standstill clause under the same Directive. The CJEU points out in both cases⁸⁶ that a breach of the obligation to notify of postponement of adoption, “constitutes a substantial procedural defect, such as to render technical regulations adopted inapplicable”.⁸⁷ A national court is thus required to refuse to apply a national regulation, which has not been adopted according to the procedure laid down in the Directive and is therefore in breach of EU law.

In view of the foregoing considerations, an agreement which has not been adopted in accordance with the procedure of Article 36 Dublin III cannot be invoked in judicial proceedings. Article 36 lays down a precise obligation of the Member States to notify the Commission of any draft bilateral administrative arrangement before they are adopted. Accordingly, non-compliance of Member States, constituting a procedural defect, renders such bilateral arrangement inapplicable so that it may not be enforced. National courts are thus obliged to not apply any bilateral arrangement in breach of Dublin III.

Furthermore, the CJEU noted in both cases (*CIA Security* and *Unilever*) that the aim of Directive 83/189 was to protect goods’ freedom of movement and that the obligation to notify is essential for achieving such control. Per analogy, according to the CJEU’s case law, the effectiveness of this control will be much greater if a breach of the obligation renders a regulation inapplicable to individuals.⁸⁸ It is undisputed that the aim of Dublin III is to determine which Member State is responsible for examining an asylum application and to

⁸² Ibid, art 36(4).

⁸³ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services.

⁸⁴ Case C-194/94 *CIA Security International SA v Signalson SA and Securitel SPRL* ECLI:EU:C:1996:172 (hereinafter: *CIA security*)

⁸⁵ Case C-443/98, *Unilever Italia SpA V. Central Food SpA* ECLI:EU:C:2000:496 (hereinafter: *Unilever*)

⁸⁶ *CIA security* (n 84); *Unilever* (n 85)

⁸⁷ *Unilever* (n 85), para 44

⁸⁸ *Unilever* (n. 85), para 44; *CIA security* (n. 84), para 48

make sure that each claim is fairly examined in one Member State. The obligation to notify is essential for achieving a preventive control by the Commission on bilateral agreements regulating which Member State is responsible for people seeking international protection.

- [Lack of compliance of the 'Administrative Arrangement' with the notification procedure of Article 36 Dublin III](#)

The bilateral agreement between Germany and Greece was most likely not submitted to the Commission for approval. To determine whether the procedure stipulated in Article 36(3)-(5) Dublin III was followed, on behalf of Ghent University's Human Rights and Migration Law Clinic, a request for access to documents under Regulation 1049/2001 was made to the Commission. More specifically, a copy of all correspondence received by the Commission from Greece and Germany in relation to the 'Administrative Arrangement' between Greece and Germany concluded on 18 August 2018 and the Commission's opinion based on Article 36(3) Dublin III on the 'Administrative Arrangement' were requested. Regrettably, the Commission does not hold any documents corresponding to the description given in our application. The Commission reaffirms that Member States are required to consult the Commission before concluding or amending a bilateral arrangement concerning the procedures or shortening of time limits under Dublin III, as stated in Article 36(3). However, the Commission confirmed that it has not been consulted on the 'Administrative Arrangement' between Germany and Greece, and has not given an opinion concerning this bilateral agreement.⁸⁹

- [Conclusion: Article 36 Dublin III: No unlimited scope](#)

According to Article 36 Dublin III, Member States can conclude bilateral agreements concerning the practical details of the implementation of this Regulation. In order to ensure compatibility, Article 36 lays down strict rules on both the scope of such agreements (Article 36(1)) and the procedure to be followed (Article 36(3)-(5)). The 'Administrative Arrangement' concluded between Germany and Greece establishes a fast-track readmission procedure for persons refused entry at the German-Austrian borders which does not imply a simplified procedure for Dublin transfers, as foreseen in Article 36(1).⁹⁰ Furthermore, as indicated above, Member States must follow the procedure stated in Article 36(3)-(5). If disrespected, following the case-law of the CJEU in the field of internal market law, the agreement cannot be applied.

⁸⁹ Full access to the document received by the Commission under Regulation 1049/2001, see Annex II.

⁹⁰ Moreover, Dublin III nor the transfer procedure is mentioned in the 'Administrative Arrangement' indicating non-application of Article 36.

C. 'Administrative Arrangement' as implementing act under Article 291 TFEU?

Article 291(1) TFEU stipulates that Member States are responsible for the adoption of all measures of national law necessary to implement legally binding Union acts.⁹¹ Following this, the only scope left for Member States in respect to Article 36 Dublin III is to conclude “administrative arrangements concerning the practical details of the implementation” of Dublin III. The question may arise as to which criteria apply to an implementing act and whether a bilateral agreement falls within the scope of Article 291 TFEU. Therefore, case law is being analysed and by analogy discussed.

The CJEU provides some general guidance regarding the legal nature of implementing acts. In the *Biocides* judgment the CJEU held that when an implementing power is conferred on the basis of Article 291 TFEU, further detail can be provided in relation to the content of the legislative act.⁹² The CJEU also indicated that the non-legislative act must be limited to the addition of further details without the acts non-essential elements having to be amended or supplemented.⁹³ The CJEU further clarified the scope of the implementing power in the *EURES* case. It noted that implementation implies that further details are added in relation to the legislative act and that the provisions of the implementing measure must (i) comply with the essential general aims pursued by the legislative act and must be (ii) necessary or appropriate for the implementation of that act without supplementing or amending it.⁹⁴

A closer look at the actual content of the 'Administrative Agreement' between Germany and Greece⁹⁵ - as analysed in the pre-emption doctrine part - suggests that it is not just an arrangement on further technical details nor a legal instrument necessary or appropriate for the implementation of Dublin III. The 'Administrative Arrangement' shall rather be considered an instrument setting forth new binding rules whose scope moves beyond the obligations established under Dublin III and without any legal safeguards guaranteed by Dublin III. This effectively amends Dublin III and therefore the 'Administrative Arrangement' clearly goes beyond the implementation allowed under Article 291 TFEU.

⁹¹ In the broader context of the implementation of EU legislation, Articles 290 and 291 TFEU set out the provisions governing the delegated and implementing powers; C Barnard and S Peers, *European Union law* (Oxford University Press 2014), 126

⁹² Case C-427/12, *European Commission v. European Parliament and Council*, ECLI:EU:C:2014:170

⁹³ Alberto Alemanno, 'The Biocides judgement: in search of a new chemistry for the principles of EU institutional balance', <<https://europeanlawblog.eu/2014/05/01/the-biocides-judgment-in-search-of-a-new-chemistry-for-the-principle-of-eu-institutional-balance/>> accessed 18 November 2018

⁹⁴ Case C-65/13, *European Parliament v. Commission* ECLI:EU:C:2014:2289

D. Conclusion on Dublin III: Limitations to Member States' powers to act bilaterally in areas where the EU has acted

It can be concluded that a Member State acts beyond its competences in areas where the EU has already exercised its competence when it can be proven that i) there is a conflict of substantive provisions between EU law and a bilateral agreement; ii) a bilateral agreement frustrates the application of EU law. As proven above: certain substantive provisions of the 'Administrative Arrangement' between Greece and Germany concern areas in which the Union has already exercised its competence in Dublin III and the Charter. Moreover, the 'Administrative Arrangement' between Germany and Greece cannot be considered an administrative arrangement under Article 36 Dublin III, nor as an implementing act under Article 291 TFEU, since it goes beyond the scope of both articles.

3. How can individuals hold a Member State accountable for not applying Dublin III but a bilateral agreement instead?

Member States are responsible for the implementation of Dublin III, which as a regulation supersedes any other national law or bilateral agreement. Member States are accountable for their acts, meaning that they shall accept their responsibilities as well as the consequences in case they fail to apply Dublin III.

A. Possible procedural avenues 'against' a bilateral agreement

- The national judges' discretion to not apply the 'Administrative Arrangement'

If an individual who is affected by the 'Administrative Arrangement' decides to act against Member States, he or she cannot bring the case directly before the CJEU. The affected individual may instead address the national courts, which have the discretion either not to apply the 'Administrative Arrangement' or to refer the question to the CJEU by using the preliminary ruling procedure (infra).

Pursuant to the direct effect of Dublin III⁹⁶ individuals can immediately invoke a European provision before a national court.⁹⁷ Following the principle of supremacy of EU law, Member States cannot apply a national rule, which contradicts EU law in areas where the EU has acted.⁹⁸ National courts are thus required to

⁹⁶ If the conditions for direct effect are met: The Treaty provision shall be clear, unconditional and prohibition would need to be autonomous. Schütze (n 7) 114-116

⁹⁷ Article 288 TFEU

⁹⁸ Craig and de Búrca (n 8) 266

disregard national legislation that conflicts with EU law. Analogically, national courts are also expected to render ‘inapplicable’ any measures taken by the Member States, which conflict with EU law.⁹⁹

- Preliminary ruling on the validity and interpretation of EU law

The responsibility for applying EU law rests in the first place with the national judge.¹⁰⁰ However, Article 267 TFEU allows the CJEU jurisdiction to deliver preliminary rulings on the validity and interpretation of EU law. In general, national judges *may* refer a question to the CJEU (discretion to refer). However, when a question of EU law is raised before a national court of last resort, this court *must* refer it to the CJEU (the obligation to refer).¹⁰¹ The CJEU does not itself apply EU law to a dispute brought by a referring court, as its role is to help resolve it. The role of national courts is to draw conclusions from the CJEU’s ruling. Preliminary rulings are binding both on the referring court and on all courts in the Member States.¹⁰² The judgment constitutes a precedent, which the CJEU will follow in similar cases.¹⁰³

If the CJEU holds that the ‘Administrative Arrangement’ violates EU law, the ruling is binding upon the national courts of all Member States. In view of this, the national judge is obliged to disregard the ‘Administrative Arrangement’ and adhere to Dublin III.

- Procedural venues on the initiative of the European Commission or another Member State

- i) Infringement procedures on the initiative of the European Commission, before the CJEU

The Commission has the power “to oversee the application of EU law under the control of the CJEU”.¹⁰⁴ In fulfilling this task, the Commission can seek recourse to the judicial procedure of Article 258 TFEU, which permits the Commission to start an infringement procedure against a Member State for breaching its obligations under EU law.¹⁰⁵ The Commission initiates the Article 258 TFEU proceedings either in response to a complaint from a third party (national or legal person) or on its own initiative. It has the discretionary power to decide whether or not to commence such proceedings.¹⁰⁶ Traditionally, once the Commission received an indication of a possible breach, it contacts the authorities of the Member States concerned in

⁹⁹ Schütze (n 7) 141

¹⁰⁰ P S R F Mathijsen, *A Guide to European Union Law* (9th edn, Sweet & Maxwell 2007) 129

¹⁰¹ Matthew J. Homewood, *EU Law Concentrate: Law Revision and Study Guide* (5th edn, Oxford University Press 2016) 45

¹⁰² EUR-lex, Preliminary ruling proceedings — recommendations to national courts (Summaries of EU Legislation, 31/10/2017)

¹⁰³ Article 17 TEU; Carl Otto Lenz, ‘The Role and Mechanism of the Preliminary Ruling Procedure’ <https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/frdint18&id=406&men_tab=srchresults> accessed 19 November 2018

¹⁰⁴ Article 17 TEU

¹⁰⁵ Article 258 TFEU

¹⁰⁶ Damian Chalmers, Gareth Davies & Giorgio Monti, *European Union Law, Cases and Materials* (2nd edn, Cambridge University Press 2010) 332

order to clarify the matter and ask them for all the information and documents it needs to form a more precise opinion on the potential breach. If the response is unsatisfactory, the Commission may start the infringement proceedings. According to Article 260 TFEU, the Commission can start a new procedure before the CJEU imposing a financial sanction against a Member State which has failed to comply with a previous judgment of the CJEU.¹⁰⁷ It is questionable as to whether the Commission would start an infringement procedure for the ‘Administrative Arrangement’ investigated in this paper, due to the political climate and lack of relevant precedents.

ii) Infringement procedures on the initiative of another Member State before the CJEU

Article 259 TFEU allows the Member States to bring infringement proceedings against other Member States.¹⁰⁸ Unlike an infringement procedure initiated by the European Commission, a Member State does not first have to contact the Member State, which is the subject of the complaint. Instead, the acting Member State must bring the matter before the Commission. The Commission delivers a reasoned opinion after giving each of the Member States an opportunity to be heard, both orally and in writing. It is only if the Commission does not issue a reasoned opinion within three months that the complaining Member State is entitled to bring an action before the CJEU.¹⁰⁹ Infringement actions brought by Member States are rare and, due to the political sensitivity around Dublin III, it is unlikely that a Member State may start such an infringement procedure for the considered ‘Administrative Arrangement’. It is deemed to be less sensitive to bring the alleged infringement to the attention of the Commission, leaving the Commission to act under Article 258 TFEU, even though this avenue is also not very probable, as indicated above.¹¹⁰

B. Individuals’ right to reparation under EU law (the Francovich doctrine)

The principle of state liability on damages for breaches of EU law was introduced in the case *Francovich and others v. Italy*.¹¹¹ The CJEU held that, under EU law, individuals harmed have a right to reparation when three conditions are met: (1) the rule of EU law infringed by the State is intended to confer rights to individuals; (2) the breach of that rule is sufficiently serious; and (3) there is a direct causal link between the breach and the loss or damage sustained by the individuals.¹¹² Regarding the severity of the breach, which was the

¹⁰⁷ Article 260 TFEU

¹⁰⁸ Article 259 TFEU

¹⁰⁹ Luca Prete, *Infringement Proceedings in EU Law*, (Volume 98, Wolters Kluwer 2017) 201- 202

¹¹⁰ Steiner & Woods, *EU Law* (11th Edition, Oxford University Press 2012) 257

¹¹¹ Joined Cases C-6/90 and C-9/90, *Francovich* ECLI:EU:C:1991:428

¹¹² *Francovich* (n 111) paras 39-40; *Brasserie du Pêcheur*; Case C-5/94 *Hedley Lomas* ECLI:EU:C:1996:205, para 25; Furthermore, the CJEU found that liability for loss and damage caused to individuals as a result of breaches of EU law attributable to a national public authority constitutes a principle inherent to the system of the Treaties, from which Member States’ obligations arise.

subject of debate in the *Norbrook Laboratories* case, the CJEU stated that ‘a breach is sufficiently serious where a Member State, in the exercise of its legislative powers, has manifestly and gravely disregarded its limits on its powers’. Although this explanation might seem too restrictive, the CJEU continued, noting that ‘where, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach’.¹¹³

State liability relies on the basic principle that national courts must protect the rights conferred on individuals by EU law, including enforcement of these rights where the state is responsible.¹¹⁴ Nevertheless, the relevant substantive and procedural conditions laid down by the national law of the Member States must not be less favorable than those relating to similar domestic claims (principle of equivalence) and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation (principle of effectiveness).¹¹⁵ On this basis, the CJEU has held that national courts ought to apply the criteria to establish the liability of Member States for damage caused to individuals by breaches of EU law, in accordance with the guidelines laid down by the CJEU for the application of these criteria.¹¹⁶ In particular, it is in principle for the national courts to assess whether a breach of EU law is sufficiently serious for a Member State to incur non-contractual liability vis-à-vis an individual and whether a sufficient cogent causal link has been established between the loss and damage claimed and the State breach of law.¹¹⁷ In the case *Traghetti del Mediterraneo*, the CJEU confirmed the principle laid down in *Köbler*¹¹⁸ under which a Member State has the obligation to pay compensation for damage caused to individuals through infringement of EU law and that this principle applies to any infringement of EU law, irrespective of the national body whose action or omission caused the infringement to arise.¹¹⁹

The three conditions for state liability seem to be met in the present case. The analysis in this paper has indicated that the ‘Administrative Arrangement’ violates certain Dublin III provisions as well as the EU Charter of Fundamental Rights. In view of the analysis, it can be argued that the breach is sufficiently serious, as the concerned ‘Member State[s] [have] manifestly and gravely disregarded the limits on [their] powers in the

¹¹³ Case C-127/95 *Norbrook Laboratories Ltd v Ministry of Agriculture, Fisheries and Food* ECLI:EU:C: 1998:151, para 109

¹¹⁴ European Foundation for the Improvement of Living and Working Conditions, *State Liability* (European Observatory of Working Life 2011) 5

¹¹⁵ Prete (n 109) 249-250

¹¹⁶ Case C-424/97, *Haim*, ECLI:EU:C:2000:357, para 44

¹¹⁷ Prete (n 109) 250

¹¹⁸ *Köbler* was especially important because it concerned compensation due to damage suffered because a highest court did not refer a preliminary question to the CJEU.

¹¹⁹ Case C-173/03, *Traghetti del Mediterraneo SpA v. Italy* ECLI:EU:C:2010:335; Case C-224/01, *Gerhard Köbler v Republik Österreich* ECLI:EU:C:2003:513

exercise of [their] legislative powers’ by concluding a bilateral agreement.¹²⁰ The margin of appreciation, which the Member States had when concluding the ‘Administrative Arrangement’, is essential to establish a serious breach.¹²¹ In the case of the agreed ‘Administrative Arrangement’, it can be questioned whether Greece and Germany were under an obligation to conclude the ‘Administrative Arrangement’ while the obligation to respect the *EU acquis* cannot be challenged. Finally, there is a causal link between the breach of Dublin III and the damages that the individuals sustain because of this breach, since Dublin III confers rights to asylum seekers, which are infringed because of the implementation of the ‘Administrative Arrangement’ instead of the Dublin III.

C. Conclusion: Possible consequences for Germany and Greece due to the implementation of the ‘Administrative Arrangement’ instead of Dublin III

Each Member State is responsible for implementing Dublin III within its own legal system whilst the Commission is responsible for ensuring that Dublin III is correctly applied. Pursuant to the direct effect of Dublin III, individuals have the right to invoke a European provision before national courts. National judges are required to disregard national legislation that conflicts with EU law. National courts can also ask the CJEU, through the preliminary ruling procedure, to interpret EU law. Furthermore, both the Commission and a Member State can introduce infringement proceedings against a Member State which breaches EU law.

4. General conclusion

In principle, EU law allows Member States to conclude bilateral agreements to the extent that the EU has not acted in the area. Nevertheless, EU law imposes limitations to Member States powers to act in areas of shared competences where the EU has already adopted binding EU provisions. Dublin III is an example of such binding EU legislation whose provisions shall precede national rules and create binding effect on the domestic legislation pursuant to the primacy of EU law. In consequence, Member States are not allowed to circumvent the Dublin III provisions by concluding bilateral agreements whose provisions explicitly conflict with Dublin III. This is, however, the case with the ‘Administrative Arrangement’ concluded between Germany and Greece in August 2018. This paper has identified several conflicting provisions in the ‘Administrative Arrangement’ which preclude substantive Dublin III provisions and the fundamental principles enshrined in the Charter. In addition, the ‘Administrative Arrangement’ risks frustrating the application of the Charter and Dublin III in a broad sense. Incompliance of the ‘Administrative Arrangement’

¹²⁰ Case C-118/00, *Larsy v. Institut national d'assurances sociales pour travailleurs indépendants* ECLI:EU:C:2001:368

¹²¹ Prete (n 109) 247


with EU law results in a violation of legal safeguards and procedural rules laid down by Dublin III that guarantee the rights of the applicants seeking international protection in the EU.

According to Article 36 Dublin III, Member States may act on a bilateral basis by adopting administrative arrangements as far as they concern practical details of the implementation of Dublin III and if the procedure laid down in Article 36(3)-(5) has been followed. Following the case-law of the CJEU, non-compliance of Member States with this procedure renders an administrative arrangement inapplicable. In addition, the scope left for Member States in regard to Article 36 is to conclude implementing acts based on Article 291 TFEU, which must comply with the general aims of Dublin III and be necessary or appropriate for the implementation without supplementing or amending Dublin III. As established in this paper, the 'Administrative Arrangement' between Germany and Greece cannot be considered as an administrative arrangement under Article 36 Dublin III, nor as an implementing act under Article 291 TFEU since it goes beyond the scope of both articles. All in all, Germany and Greece shall account for their failure to apply Dublin III and accept the consequences for the implementation of the 'Administrative Arrangement'. Infringement proceedings may be initiated against them under Articles 258 and 259 TFEU by the Commission and another Member State respectively. However, it is more likely that individuals will seek reparation against the Member States before the national courts, which will have to render the 'Administrative Arrangement' inapplicable. These national courts may also bring the matter before the CJEU according to the Article 267 TFEU procedure (preliminary ruling).

5. Annex I: Summary of the conflicting provisions between EU law and the ‘Administrative Arrangement’

| EU Charter | Dublin III | ‘Administrative Arrangement’ | Conflict with EU law |
|------------|--------------------------------------|------------------------------|-------------------------------------------------------------------------------------------------------------------------------------|
| Article 18 | Articles 3 and 7 | No 1 | Conflict with access to the asylum procedure and application of the hierarchy of criteria determining the responsible Member State. |
| Article 4 | Article 3(2) | No 1 together with Nos. 2-3 | Conflict with the principle of <i>non-refoulement</i> |
| -- | Articles 4 and 5 Sections II and III | No 1 together with Nos. 2-4 | Conflict with the Dublin III specific procedural guarantees |
| Article 47 | Article 29 | No 1 together with Nos. 2-4 | Conflict with the legal safeguards |

6. [Annex II: document received by the Commission under Regulation 1049/2001](#)

 Ref. Ares(2018)6332309 - 10/12/2018



EUROPEAN COMMISSION
DIRECTORATE-GENERAL MIGRATION and HOME AFFAIRS

The Director-General

Subject: Your application for access to documents – Ref GestDem No 2018/6046 and 2018/6118

Dear Madam,

We refer to your e-mails dated 19/11/2018 and 20/11/2018 in which you make a request for access to documents, registered on 19/11/2018 and 20/11/2018 respectively under the above-mentioned reference numbers.

You request access to all correspondence received by the Commission from Greece and Germany in relation to the administrative agreement between Greece and Germany on cooperation when refusing entry to persons seeking protection in the context of temporary checks at the internal German-Austrian border (concluded on 18 August 2018) and the Commission's opinion based on Article 36(3) of the Dublin Regulation (EU) No 604/2013 on this administrative arrangement.

We regret to inform you that the Commission does not hold any documents that would correspond to the description given in your application.

Member States are required to consult the Commission before concluding or amending a bilateral arrangement concerning the procedures or shortening of the time limits under Regulation (EU) No 604/2013¹, see Article 36(3). However, Member States are not required to consult the Commission regarding bilateral agreements concluded between Member States not concerning the application of this Regulation. The Commission has not been consulted on the bilateral agreement signed between Germany and Greece, and the Commission has not given an opinion concerning this bilateral agreement.

As specified in Article 2(3) of Regulation 1049/2001, the right of access as defined in that regulation applies only to existing documents in the possession of the institution.

¹ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)

Given that no documents corresponding to the description given in your application, are held by the Commission, the Commission is not in a position to fulfil your request.

In accordance with Article 7(2) of Regulation 1049/2001, you are entitled to make a confirmatory application requesting the Commission to review this position.

Such a confirmatory application should be addressed within 15 working days upon receipt of this letter to the Secretary-General of the Commission at the following address:

European Commission
Secretariat-General
Transparency, Document Management & Access to Documents (SG.C.1)
BERL 5/282
B-1049 Bruxelles or by email to: sg-acc-doc@ec.europa.eu

Yours faithfully,

(e-signed)
Paraskevi MICHOU